REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
(Coram: Odunga, J)
PETITION NO 20 OF 2018
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 10,19(2); 20 (1), (2), (3) & (4); 21 (1);23(3), 27(1), 40 (3); 46, 47(1); 258 (1) & 259 (1)
AND
IN THE MATTER OF SECTION 203 OF THE INSURANCE ACT CAP 487 OF THE LAWS OF KENYA
AND
IN THE MATTER OF SECTION 4,10 OF THE INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS) ACT CAP 405 THE LAWS OF KENYA
PETER MWAU MUINDE.....1ST PETITIONER
INTERCOUNTY EXPRESS LIMITED.....2ND PETITIONER
VERSUS
INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
INVESCO ASSURANCE COMPANY LIMITED.....3RD RESPONDENT
AND
CLAIMANTS IN THE FOLLOWING ACCIDENTS
KBU 400 A on 2/5/2016
KBU 308A on 16/8/2015,
KAW 248D on 20/12/2018
AND AS PER THE ATTACHED LIST.....INTERESTED PARTIES

JUDGMENT

1.The Petitioner filed an amended Petition dated 18th December 2018 in which they sought the following orders;

a. **A declaration that Fundamental Rights and Freedoms of the Petitioners have been violated by all the Respondents.**

b. **A declaration and order that the Respondents jointly and severally should meet and make payment of all Decretal sums and costs entered against the Defendants in the cases arising from accidents for which the Petitioners had obtained insurance cover under Section 4 of the Insurance (Motor Vehicles Third Party Risks) Act.**
c. **An order for a permanent injunction to restrain all Claimants from executing the Court judgements against the Petitioners in respect of accidents for which the Petitioners had obtained insurance cover under section 4 of the Insurance (Motor Vehicles Third Party Risks) Act.**
d. **An order directing the 1st and 2nd Respondents to take measures that the court may deem fit to ensure that the 3rd Respondent is operating in accordance with the prevailing legal framework.**
e. **Costs of this petition.**
f. **Any other relief that this Honourable court may deem just to grant.**

2. The Petition was supported by the Affidavit of **Peter M Muinde** sworn on 6th of November 2020 in which he deposed that he is a retired police officer who owned of Motor Vehicle Registration number KBU 400A and KBU 308A which were operating as public service vehicles. However, in 2015 due to the perceived conflict of interest in police officers owning public service vehicles, he transferred his proprietary interests to the 2nd Petitioner in 2016. The insurance policies with the 3rd Respondent were however retained and the 3rd Defendant even took up defenses of the claims arising from various accidents. He contended that the 2nd Petitioner forwarded all summons to enter appearance to the 3rd Respondent to either settle or defend the suits as it would deem fit which resulted in interlocutory judgments for the

undefended suits and judgement against the Petitioners in the defended ones.

3. It was his case that whereas the 3rd Respondent is obliged to meet the claims in 90 days of being lodged, the same was not done leading to auctioneers seeking to attach his personal property despite him transferring the business two years back. He contended that this happened despite having paid up premiums to the 3rd Respondent. He lamented that this amounts to double jeopardy. In his view, it is against public interest for the 3rd Respondent to fail to fulfil its financial obligations under the eye of the 1st and 2nd Respondent.

4. The Application is also supported by the affidavit of **Ian Kay Mwau,** the director of the 2nd Petitioner sworn on 6th November 2020 in which apart from confirming the averments made by the 1st Petitioner, he deposed that the Respondents have violated Article 40 (2 and3), 46 ,47 (1), 48 and 50 of the Constitution of Kenya.

5. He deposed that the 1st and 2nd Respondents despite having powers to supervise, monitor and regulate insurance players failed to perform its role in noting that the 3rd Respondent is facing liquidity problems and acting early enough to protect the public or invoking the Policy Holders Compensation fund despite signs that all is not well. This, according to him, was an abdication of the powers given under Section 67 C of the ***Insurance***

Act since he failed to make a decision one way or the other in respect of the 3rd Respondent.

The 1st and 2nd Respondents' Case

6. On their part, the 1st and 2nd Respondents filed grounds of opposition on 18th February 2019 dated 15th February 2019 in which they raise the following grounds;

   a. The Petition raises no justiciable constitutional issues for determination.

   b. The Petition is seeking to litigate a commercial claim based on a contract with the 3rd Respondent as a constitutional petition.

   c. The petition is a claim for enforcement of the terms of a judgement and raises no justiciable constitutional issue for determination.

   d. The Petitioners claim has failed to meet the threshold for specificity in drafting as elucidated by the principles in the case of **Anarita Karimi Njeru vs Republic (1979) 1 KLR 154** reiterated in by the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance, Civil Appeal No 290 of 2012.**

   e. The Petition has failed to meet the basic requirements as form as set out in Rule 10 of the Mutunga Rules (the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules 2013)

f. The Petition has failed to meet the requirements of Rule 11(2) of the Mutunga Rules.
g. The Petition has failed to specifically outline and demonstrate his claim against the 2nd Respondent.
h. The Petition has failed to meet the requirements of section 107 of the Evidence Act, Cap 80.
i. The petition violates the provisions of Article 50 (2) of the Constitution of Kenya (2010) in failing to enjoin the interested parties against whom he is seeking orders.
j. The Petitioner has failed to demonstrate the requirements for a grant of orders of permanent injunction having failed to demonstrate the elements as set out in the case of **East Africa Industries vs Trufoods EA 20** and in the case of **Giella vs Cassman Brown (1979) EA** affirmed in various superior court authorities.
k. The orders sought in the Petition and the consequential orders thereto would have adverse effects on the interests of third parties aptly referred to as "interested parties" who are not parties to the petition.
l. As per Article 50 as read together with Article 47, it is only fair and just that the "interested parties" be granted an opportunity to be heard.
m. The orders sought in the Petition are vague and ambiguous and therefore incapable of being granted by this Honorable Court.

n. The Petitioner has failed to demonstrate that they are entitled to an order for costs as pleaded.

o. The Petition is vague and does not raise issues for Constitutional interpretation by this Honourable Court and therefore ought to be struck out with costs to the Respondents.

p. The Petition is vague, frivolous, vexatious and an abuse if the Honourable Courts time and process

7.The 3rd Respondent did not file a response to the Petition.

Interested Parties'Case

8.The interested parties being the claimants in the accident involving Motor Vehicles registration numbers KBV 400A and KBA 308A filed a grounds of objection dated 8th of June 2021 in opposition of the Petition in which they stated that the Petitioner has been settling the decretal sums in unacceptable terms and has never sought stay of execution.

9.The interested parties opined that this was not an issue that they should be party to, as it was an issue of breach of contract between the Petitioner and the Respondent and thus the Petition is meant to deny them the fruits of their judgement.

10.The Petition was disposed of by way of written submissions.

Petitioners' Submissions

11.The Petitioner filed submissions dated 7th October 2021 in which they highlighted four (4) issues. The first issue was whether the petition was

drafted in accordance with the requirements. The Petitioners submitted that the amended petition expressly stated the violated provisions, adequately pleaded the manner of violation and concisely stated the remedies sought in accordance with the ***Anarita Karimi Njeru Rule*** and the ***Mutunga Rules***.

12. Secondly, as to whether the petition raised justiciable constitutional issues, the Petitioner relied on the cases of **C N M vs. W M G [2018] eKLR** and **Maggie Mwauki Mtalaki vs. Housing Finance Company of Kenya [2015] eKLR** and contended that the Petition fits within the description of what raises constitutional questions. It was submitted that Article 46 of the Constitution had been infringed as they are consumers of insurance services that they have paid for and that the Insurance Regulatory Authority exists to regulate the said insurance services which they never enjoyed. According to them, Article 46 of the Constitution applies to goods and services offered by public entities or private persons. They contended that the conduct of the regulator is in question and they needed to account for their inaction. Thus to the Petitioners, this dispute is beyond two contracting parties and concerns the management of the insurance industry. Reliance was placed on the case of **Commission of Administrative Justice vs. Insurance Regulatory Authority and Another [2017] eKLR.**

13. As to whether the Petitioners fundamental rights and freedoms have been violated, the Petitioners contended that they complied the law and took out

insurance cover for their motor vehicles and even paid premiums but the 3rd Respondent abdicated its role and abandoned the Petitioners at their time of need by failing to satisfy the decrees issued against the Petitioners. In this regard, they cited Article 46 of the Constitution and the ***UN Guidelines for Consumer Protection*** as well as the cases of **Alan E Donovan vs. Kenya Power & Lighting Company [2021]** and **Mark Ndumia Ndung;u vs Nairobi Bottlers Limited and Another [2018] eKLR.** It was their submissions that the 3rd Respondent did not provide quality services as required and despite the interested parties' contention that some payments have been made, it had been trickling at unacceptable rates. Further that this conduct amounts to deceit and obtaining by false pretense. In addition to this, the Petitioners maintained that they were suffering losses every week as they were constantly being executed against and their businesses ruined, leading to heavy losses thus exposing them to the risk of insolvency from the number of claims. They relied on the case of **Caroline Karimi Moses vs Insurance Regulatory Authority & 3 others [2019] eKLR**.

14. The Petitioners contended that the 1st Respondent as established by Section 3 of the ***Insurance Act*** has its objects and roles provided under Section 3A of the Act ,which roles the 1st Respondent failed to perform leading to inability on the part of the 3rd Respondent to pay claims and in this regard, they relied on **Invesco Assurance Company Limited & 2 others vs.**

Auctioneers Licensing Board and Another, **Kinyanjui Njuguna & Company Advocates and Another (interested parties) [2020]** and **Kinyanjui Njuguna & Co Advocates vs Invesco Assurance Limited [2021] eKLR**.

15. The Petitioners contended that the 1st Respondent failed to note the 3rd Respondent's liquidity problems in order for it to act early enough in order to protect the public or even invoke payments under the Policy Holders Compensation Fund. As a result, the Petitioners' rights to property under Article 40 of The Constitution has been breached. In support of their submissions, the Petitioners referred to Article 47 of the Constitution on fair administrative action and contended that the actions of the 1st and 2nd Respondent were slow, inefficient, unlawful, unreasonable and unfair.

16. On his part, it was contended that the 2nd Respondent failed to compel the 1st Respondent to ensure that the 3rd Respondent is compliant with all policies and claims therein. As a result of the acts of omission of the Respondents, they have been deprived of their rights, the accident victims have been unable to recover compensation for their injuries and the public confidence in the insurance sector as a whole has been eroded since one can never be sure whether the claims will be paid.

17. To the Petitioners, they are entitled to the orders sought, and urged the court to grant them the orders sought.

1st and 2nd Respondents' Submissions

18. On behalf of the 1st and 2nd Respondents, it was submitted that the Petition is indicative of a commercial dispute arising out of a contractual relationship between the Petitioners and the 3rd Respondent herein and thus does not raise questions of constitutional nature which are guided by principles of the law of contract. While relying on the ***Mutunga Rules*** particularly Rule 10 and 4, it was submitted that courts have settled the question of substance and the nature of drafting a Constitutional Petition in the case of **Anarita Karimi Njeru vs. Republic [1976-80] 1 KLR 1272**.

19. It was submitted that this matter does not qualify as a constitutional petition as for a matter to qualify as a constitutional petition it must raise constitutional issues/questions for determination by the court, the petition must outline the constitutional provisions violated, the nature of injury caused or likely to be caused to the petitioner or the person in whose name the Petitioner has instituted the suit or in a public interest case to the public, class of persons or community and it must be drafted with sufficient specificity as to enable the Respondent respond to the allegations. It was therefore contended that the Petition must fail.

20. Furthermore, it was submitted that the 1st and 2nd Respondents were not parties to the suits by virtue of their contractual nature in violation of privity of contracts. The said Respondents averred that subjecting them to pay unspecified sums arising out of the claims would amount to a great injustice and a violation of the principles of public finance management under Article

201(d) as public funds are not for settling private debts arising out of private contractual relationships.

21. The 3rd Respondent and the interested parties did not file submissions.

Determination

22. I have considered the Petition, the responses thereto and the submissions.

23. It is contended that there is lack of precision in the manner in which this petition was pleaded and that this falls afoul of the principles in the case of **Anarita Karimi Njeru vs. Republic [1976-80] 1 KLR 1272, Mumo Matemu vs. Trusted Society of Human Rights Alliance, Civil Appeal No 290 of 2012** and Rule 10 of the ***Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules 2013*** (otherwise known popularly as "Mutunga Rules").

24. It is important to point out that the decision in **Mumo Matemu vs. Trusted society of Human Rights Alliance & 5 Others (2013) eKLR** was an approval of the earlier decision in the oft cited case of **Anarita Karimi Njeru vs. Republic, (1979) KLR 154.** It is however my considered view that the decision in ***Anarita Karimi Njeru*** must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain

proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that a petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a constitutional petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

25. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a constitutional court and

therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my respectful view, even where a party has not expressly stated the provision of the Constitution under which his petition is brought, as long as the Court can deduce the provisions of the Constitution threatened with violation or violated the Court ought not to dismiss the petition merely because the provisions are not cited in the Petition.

26. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of, would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

27. My view is informed by the decision of the Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR**, in which the Court

declined to adopt the ***Anarita Karimi*** (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

> **"Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154,* the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal...The narrow approach in *ANARITA KARIMI NJERU* was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1)*."**

28.I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

> **"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution."**

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30. It is therefore my view that even where before the Court is a "home-made" petition, unless it is contended by the Respondent that he is unable to discern the complaints raised therein, the Court as the defender of the Constitution must arise to a higher calling by interrogating the issues in contention instead of elevating technicalities to fetish.

31. It is contended that the issues raised herein are purely contractual matters which do not rise to the level of Constitutional issues. In **Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385, Nyamu, J** held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193**, Court the expressed itself as hereunder:

"We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on

the point... Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn triviliase the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry... It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is

frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

32. Whereas every person is, pursuant to the provisions of Articles 3 and 22 of the Constitution, under an obligation to respect, uphold and defend the Constitution and a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:**

"Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process…A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action… The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard

of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms."

33. So, in **General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR**, **Wendoh, J** expressed herself as hereunder:

"The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. *(See Ben Kipeno& Others vs. AG Pet15/07 and Bahadur vs. AG (1986) LRC Const 297* where the court said;

> **"The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under**

substantive law, the proper cause is to bring the claim under that law and not under the Constitution."

In *Speaker of National Assembly vs. Njenga Karume (1990-1994) EA 546* the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also *Harrikisson vs. AG (1979) 3 WLR 63."*

34.Further afield, in **NM & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)** the Constitutional Court of South Africa stated that:

"**It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.**"

35.Similarly, in **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ** held as follows;

"It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22)."

36.The judge added that:

"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to

an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

37. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) and in **Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012** declined to hear an appeal and stated:

"In the petitioner's whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court…the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court."

38. Subsequently, in **Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board Petition No. 5 of 2012** the Court held that:

"…a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained."

39.It is in that light that I understand the Court's position in **John Harun Mwau vs. Peter Gastrow& 3 Others [2014] eKLR** that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

> **"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights…It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so."**

40.Similarly, in **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J** (as he then was) held that:

> **"Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions."**

*41.*To **Mativo, J** in **Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR**:

"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

42. Therefore, it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

43. Nevertheless, as held in **Jeminah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012**:

"...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution."

44. The rationale for this was given in **Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011** where it was held that:

"All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of

excesses within administrative processes. In this case, the former must be true.....I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof".

45. Therefore, as appreciated in **Jeminah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012** that:

"...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution."

46. That brings me to the matter at hand. In this petition, it is contended that the 1st Respondent failed in its regulatory duty to supervise the operations of the 3rd Respondent in order to ensure that those who are consumers of the 3rd Respondent's insurance services do not suffer as a result of the 3rd Respondent's actions or inactions. Article 23(1) of the Constitution states;

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

47. Article 165 of the Constitution of Kenya provides the jurisdiction of the High Court;

"(1) There is established the High Court, which—
(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

Sub article 3 states; Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;"

48. The Petitioners, inter alia, allege violation of Article 46 of the Constitution which provides that;

Article 46 provides that;

(1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

Article 47 (1) provides that;

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

49. According to the Petitioners, they were insured by the 3rd Respondent who has failed to meet his end of the bargain by failing to pay the interested parties and this settle the various decrees leading to the Petitioners property being executed and attached by various auctioneers. That contention is not disputed by the 3rd Respondent. It is contended that had the 1st Respondent carried out its statutory obligations, the matter could have been salvaged and that the Petitioners rights would not have been threatened. **Mativo, J** in the case of **CNM vs WMG (2018) eKLR** in which **Mativo, J** cited with approval the South African case of **Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC)** in which **Justice O'Regan** noted as follow:-

"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of…the

Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State…the interpretation, application and upholding of the Constitution are also constitutional matters. So too…is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."

50. In my view, where it is alleged that as a result of the failure by a state organ to carry out its statutory mandate, a person's rights are threatened with violation or have been violated, the matter transcends the contractual arena and enters the constitutional arena. In this case, it cannot be said that the matter is contractual since there is not contract between the petitioners and the 1st and 2nd Respondents, yet they are being blamed for exposing the petitioners to a risk of losing their rights to properties as a result of their inaction.

51. Having considered the issue raised herein I find that the issues raised herein justify the filing of a constitutional petition and that the petition is properly before this court.

52. According to section 3A of the ***Insurance Act***, the objects and functions of the 1st Respondent are:

> ***a) ensure the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya;***
> ***(b) formulate and enforce standards for the conduct of insurance and reinsurance business in Kenya;***
> ***(c) license all persons involved in or connected with insurance business, including insurance and reinsurance companies, insurance and reinsurance intermediaries, loss adjusters and assessors, risk surveyors and valuers;***
> ***(d) protect the interests of insurance policy holders and insurance beneficiaries in any insurance contract; (e) promote the development of the insurance sector;***
> ***(f) advise the Government on the national policy to be followed in order to ensure adequate insurance protection and security for national properties; and***
> ***(g) issue supervisory guidelines and prudential standards from time to time, for the better administration of the insurance business of persons licensed under this Act;***
> ***(h) share information with other regulatory authorities and to carry out any other related activities in furtherance of its supervisory role;***
> ***(i) undertake such other functions as may be conferred on it by this Act or by any other written law.***

53. It is not contested that the 3rd Respondent has failed to meet its statutory obligations under section 10 of ***Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya** which provides that:

> ***(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a***

policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments [emphasis mine]

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to

the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5) Deleted by Act No. 8 of 2009, s. 41.

(6) In this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

54. It is therefore clear that insurance cover is not just a contractual relationship between the insured and the insurer. The relationship in fact gives rise to a statutory obligation on the part of the insured. That the relationship is regulated by statute shows the importance attached by the State to such relationships. Considering the fact that such relationships affect third parties to the contract such as passengers and those who suffer injury while using the services covered by the insurance policy, it is only expected that the State would also take a keen interest on how the insurance industry is being run so as to give meaning to the compulsory requirement for those to take their vehicles to the road to take out appropriate covers. When motor vehicle owners are compelled to take out insurance policy covers, they have

legitimate expectation that the State will efficiently regulate that sector so that in the event that they are called upon to compensate those who suffer injuries that are covered by the policy, they will be protected from having to directly compensate the injured. **Mativo, J** in **Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] eKLR** similarly expressed himself as follows:

> **"A statutory body is bound to adhere to mandate stipulated in the statute creating it and its actions must conform to the constitutional prescriptions as clearly provided in our transformative constitution. In my considered view, Insurance regulatory law is the body of statutory law, administrative regulations and jurisprudence that governs and regulates the insurance industry and those engaged in the business of insurance. Insurance regulatory law is primarily enforced through regulations, rules and directives by state insurance departments as authorized and directed by statutory law enacted by the legislature. Insurance is characterized as a business vested or affected with the public interest. Thus, the business of insurance, although primarily a matter of private contract, is nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public's interests. Therefore, the fundamental purpose of insurance regulatory law is to protect the public as insurance consumers and policyholders... My reading of the provisions of the Insurance act is that the functions of the first Respondent are:- to ensure effective regulation, supervision; development of insurance in Kenya; to formulate and enforce standards; to issue licences; to protect the interests of insurance policy holders and insurance beneficiaries; to promote the development of the insurance sector; to ensure prompt settlement of claims; to investigate and prosecute insurance**

fraud…In my view, regulation entails ensuring that players comply with the provisions of the Insurance Act. <u>Supervision</u> means the oversight function the first Respondent exercises over the operations of insurance companies. Among the supervisory functions are; ensuring the viability of applications for licensing, ensuring that all board members are Fit & proper, ensuring that all senior management staff Fit & proper, Ensuring that insurers have adequate Capital at all times, Approval of insurance products, Inspection, investigation, analysis of accounts and returns, intervention and withdrawal of licenses among others.

55. In my view, it serves no purpose for the State to compel people to take out policy covers when at the end of the day, the State does not ensure that people benefit from the services they are paying for. The people have delegated their authority to the State in expectation that the State will undertake its mandate as expected by the people. When the State or its organs fails to do so, then the State must compensate the people who suffer as a result of its failure to live to its expectation. Otherwise, the people may then recall their mandate which they delegated to the State and its organs in which event you have anarchy.

56. Therefore, where the State fails to protect the insured against unscrupulous insurers yet ensure that the insured take out insurance covers at their costs, it is only just that the State takes responsibility for its failure to regulate the players in the industry otherwise it would be assisting those insurers who use statutes as instruments of fraud. Insurance companies do not just collapse. Before they do so, there are usually tell-tale signs or indicators

which can easily be discerned by hawk eyed officers of the 1st Respondent if keen enough instead of waiting until the insurer cannot meet its statutory obligations before moving in to perform the last rights.

57. Once the said signs become apparent, the 1st Respondent should move with speed and invoke his powers under Section 67 C (2) which provides that;

> ***The Commissioner may, with the approval of the Board – [No.1 of 2014, s. 12]***
>
> ***(i) appoint a competent person familiar with the business of an insurer (in this Act referred to as "a manager") to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of the board of directors, including the use of the company seal;***
>
> ***(ii) remove any officer or employee of an insurer who, in the opinion of the Commissioner, has caused or contributed to any contravention of any provisions of this Act, or any regulations or directions made thereunder or to any deterioration in the financial stability of the insurer or has been guilty of conduct detrimental to the interests of policy- holders or other creditors of the insurer;***
>
> ***(iii) appoint three competent persons familiar with the business of insurers to the Board of Directors to hold office as directors who shall not be removed from office without the approval of the commissioner.***
>
> ***(iv) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the insurer in favour of any officer, employee or any other person.***

58. I am not holding that in every case where an insurance company collapses, the 1st Respondent should be held liable. Where the 1st Respondent takes the

necessary steps to ensure that an insurance company operates within the law but due to matters that the 1st Respondent was unable to unearth despite exercise of reasonable diligence, the 1st Respondent would not be liable. In this case, despite being given an opportunity to explain itself, the 1st Respondent has not stated what action, if any, it took to forestall the imminent collapse of or inability by the 3rd Respondent to meet its statutory obligations as a result of which the Petitioners' rights have been violated or are threatened with violation. Its failure to explain itself in this petition can only mean that it never performed its mandate under the ***Insurance Act*** and for that it is constitutionally liable.

59. However, as the third party victims of the actions or inactions of the 1st Respondents cannot be subjected to suffer for the same, they ought not to be embroiled in the fight between the petitioners and the 1st Respondent.

60. I have said enough to show that there is merit in this petition. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

1) **A declaration that Fundamental Rights and Freedoms of the Petitioners have been violated by the 1st and 3rd Respondents.**
2) **A declaration and order that the 1st Respondent should meet and make payment of all Decretal sums and costs entered against the Defendants in the cases arising from accidents for which the Petitioners had obtained insurance cover under Section 4 of the Insurance (Motor Vehicles Third Party Risks) Act.**

3) **An order directing the 1st and 2nd Respondents to take measures to ensure that the 3rd Respondent is operating in accordance with the prevailing legal framework.**

4) **The Costs of this petition are awarded to the Petitioners to be borne by the 1st Respondent**

61.Judgement accordingly.

Judgement Read, signed and delivered in open Court at Machakos this 7th day of June, 2022.

G V ODUNGA
JUDGE

Delivered in the presence of:

Mr Thuita for the Petitioners

Mr Muthama for Mr Mutua Makau for the Interested Parties

CA Susan